Central Law Journal.

ST. LOUIS, MO., AUGUST 6, 1915.

ADVERTISEMENT OF LIQUOR IN NEWSPAPERS PROTECTED BY INTERSTATE COMMERCE CLAUSE CIRCULATED IN PROHIBITION STATES.

The Supreme Court of Alabama decides a case on a theory which may or may not fit the facts at all. It held that, as the Supreme Court of the United States had held, that an agent from another state soliciting liquor orders in prohibition territory, was not protected by the commerce clause, so an agent selling newspapers from another state, containing liquor advertisements, forbidden by state statute, came under local law, because such advertisement was but solicitation of liquor orders in another way. State ex rel. v. Delaye, 68 So. 993. Is this conclusion a *non sequitur* or not?

If an agent soliciting orders for liquor in local option or prohibition territory is amenable to local law, it is not because the preliminary recommendation of his goods is punishable, according to the principle laid down in Delamater v. South Dakota 205 U. S. 93. He might have begged and implored one to buy and in doing so puffed his favorite brands all his imagination or his knowledge of merits justified, yet if he made no sale, the whole thing would be *vox et preterea nihil*. To punish it would be the punishing of free speech, and nothing more.

A careful view of the opinion in the Delamater case shows, that the agent, who was prosecuted for violating the statute, was a traveling salesman, and carried on the business of soliciting orders, from residents of the prohibition state, for intoxicating liquors in quantities of less than five gallons. The statute imposed a license upon "the business of selling or offering for sale intoxicating liquors" by any traveling salesman who *solicits* orders by the jug or bottle in lots less than five gallons.

We take it that "soliciting," as used in this statute was, so to speak, mere inducement. It was not in description of the offense. One might solicit the agent to sell and the offense would be as complete, if an order was accepted and a sale made. It was a word merely generally to define the business of a traveling salesman.

It is true enough, as the court holds, that newspapers sent from another state, and offered for sale by an agent, entered into the mass of property in Alabama, and came under its police power in its further disposition, but this police power may be circumscribed in its operations by the commerce clause, and it would make no difference, so far as this hindrance is concerned, that the police power of the state was exerted in behalf of morality or merely to aid in enforcement of state policy independently of morality.

Contrariwise, state policy is not to be denied enforcement, because incidentally, and not directly, it may affect interstate commerce. But when it is enforced, so as to have incidental effect on articles shipped in interstate commerce, its limitations ought to be well defined.

Take for example, the injunction brought in the Alabama case. An agent was in possession of newspapers which were rightfully acquired and lawfully shipped. They contained objectionable matter, printed therein, which made them unsalabe as merchandise, as claimed. There is no doubt that the advertisement is lawfully inserted, and at the home state of the newspaper it effects no legal or moral wrong. May there be restraint on its circulation in another state, when that state is not protecting its people in a moral, but only in a legal, way? And does this extend to absolute destruction of property lawfully acquired?

The bounds of a lawful enactment are the purposes and the practices it aims at. As the purpose of the Alabama statute is to denounce an offense committed in the

state, then newspaper proprietors, in the statute preventing the circulation of liquor advertisements, are aimed at, or it is their property which is sought to be destroyed. If being warned against publication of such advertisements, they yet allow them to be inserted, it is right to punish them for the circulation of papers containing them. It is different, however, as to their insertion in a foreign state. This cannot be legislated against, and it is gravely to be doubted that an innocent act can be made the occasion of practical confiscation abroad, and any law accomplishing such a result ought to be clear beyond controversy.

Newspapers published anywhere and everywhere are supposed to be aware of the requirements of morality, but they are not supposed to be aware of local legislation in another state in furtherance of local policy, and it does not seem just, that a metropolitan concern, like a newspaper, observing all local laws in its publication, should be barred from selling its copies abroad, because the purchaser thereof is not able to treat them as merchandise, the purpose he has in view as a purchaser. But, however, this may be, it seems quite evident, that the Delamater case as a ruling did not touch the question involved in the Delaye case.

NOTES OF IMPORTANT DECISIONS.

BULK SALES LAW—GIVING OF CHATTEL MORTGAGE ON STOCK OF GOODS.—There is indicated, but the question is not squarely ruled, in a case decided by Supreme Court of Michigan, a serious defect in the operation of restrictions put in force by bulk sales statutes. Symons Bros. & Co. v. Brink, 153 N. W. 359.

This case showed the sustaining of a demurrer by the lower court to a bill to enjoin a sale under a chattel mortgage alleged to violate the bulk sales law of Michigan, in its being given without any notice to creditors of the mortgagor. The lower court said it saw much difficulty in making the bulk sales act apply to the giving of a chattel mortgage and it sustained the demurrer *pro forma* so as to pass the question up to the supreme court.

The supreme court, however, avoids ruling on this subject, in the state of the record, though the controlling reason for sustaining the demurrer was that giving a chattel mortgage under no circumstances could be deemed a sale under the act. This was a question apparently of so much importance, that it ought to have been passed upon, but technical considerations, not regarded by the trial court, prevented this being done.

STATUTORY CONSTRUCTION — RULE WHEN VALIDITY IS OF DIRECT BENEFIT TO JUDICIAL OFFICER.—It may so happen, that it is not always possible for a judge not to be called on to decide a question which directly pertains to his own interest. Should a case arise where this is so, the necessity of such an event should not cause any deviation from ordinary rules of construction.

For example, in the Supreme Court of South Dakota the question arose as to the constitutionality of a statute giving an amount above regular salary to judges of the supreme court who, not residing at the state capital, should remove to the capital during their term of office. Of necessity these judges had to pass on the validity of the statute. McCoy v. Handlin, 153 N. W. 361.

The court sustained the statute and in the opinion said: "An act of the state legislature will not be held unconstitutional, unless its unconstitutionality appears practically beyond a reasonable doubt. We are, however, not content to base our decision herein upon such rule, but owing to our direct interest therein, we believe that we should refuse" to hold this statute constitutional, "unless it appear clear that, under both reason and authority, the law in question is constitutional." It then argues and concludes that there was no reasonable doubt of the statute being constitutional.

We are not greatly impressed with such an announcement as the court made with regard to a different rule of construction, especially as in the opinion it appeals to the people to credit the court with meeting the issue presented squarely. It looks like a case of "protesting too much"—so very much, indeed, that there is announced an illogical rule at the start.

We do not see, that this statute, if its constitutionality was doubtful, should not have been sustained according to the general principle announced, and this without any apology

by the judges who, under a rule of necessity, were called on to decide such a question. It was not their fault that this necessity arose. In every question of a public nature they may have an interest for or against a statute, but the interest of declaring the truth in legal principle is supposed to override all else. As matter of fact, emphasis in application of the rule, that no one shall be judge in his own case, is in so far as questions of fact are concerned. These can never return to plague one in subsequent rulings.

MONOPOLIES—UNITED STATES STEEL CORPORATION GUILTY, BUT DISCHARGED.—Four judges sitting in district court in the district of New Jersey are at one in holding, that the decree for dissolution of the United States Steel corporation prayed for by the government should be refused, and they all agree, too, that the bill, upon the government's request, should be retained for restraining any such movements in the future as was participated in by defendants, as they were shown to have been guilty in the past. There are two opinions, each concurred in by two of the judges, and reasoning to the two conclusions is practically the same way. United States v. United States Steel Corporation, et al., 223 Fed. 55.

The celebrated "Gary dinners" were the occasions when the agreements denounced by the four judges as agreements to create a monopoly were made, and attendants at them feasted and plotted from November, 1907, until January, 1911. The bill for dissolution was not filed until October, 1911. It was agreed at these "dinners" that what was determined on should remain until another dinner was called. It does not seem that this made such an interruption as should suggest a remark like that made by the Governor of North Carolina to the Governor of South Carolina, especially if tacitly the situation was preserved between January and October.

There seemed in this case the thorough establishment of the *animus peccandi* and the lack of "testimony to show that since the date of the last Gary dinner the corporation, either alone or in co-operation with others, had fixed or maintained prices, or attempted to do so," indicates that the court thought the burden was on the government. What sort of circumstances ought to have put it on the defendants to make a showing? If there was enough to hold the bill for any purpose, there ought to have been enough to grant the relief prayed for.

BANKS AND BANKING—DRAFT BY PRESIDENT OF MERCANTILE CONCERN PAID BY EXCHANGE SIGNED BY HIM AS CASHIER.—In Pemiscot County Bank v. Central State Nat. Bank, 177 S. W. 74, there was a bill filed by the insolvent Pemiscot bank to recover from the other bank and a mercantile firm, the amount collected for the use of the latter as proceeds of exchange signed by the cashier of the insolvent, given to pay a draft by a corporation, indebted to the mercantile firm, which draft was signed by the president of the corporation, who also was cashier of the insolvent bank. The lower court held in favor of recovery and this holding was by Supreme Court of Tennessee reversed.

The Supreme Court said: "To enlarge the exception to the general rule as to the power of a cashier to issue bank drafts, so as to include in that exception drafts or cashier's checks drawn in favor of such corporations or its creditors would be to seriously hamper commercial transactions. The settlements made with such paper as exchange vastly exceed in number and amount those made with currency. Sound policy dictates that no further burden be placed by the courts on such paper to the embarrassment of commerce."

It is not very clear from the statement whether both the bank forwarding the draft and receiving therefor the cashier's check were held liable, or only the mercantile concern in whose favor it was drawn. If only the latter, we fail to see how all that is said about enlarging the exception applies. If one gets a check signed by a corporate officer in payment of his own bill, the rule is, that the receiver of the check is affected with notice. The check is perfectly good in the payee's hands to collect it, and so also as to anyone to whom it is transferred. But the principle therefor has nothing to do with negotiability of a check, nor should it have anything to do with the negotiability of a cashier's check.

Suppose the cashier of the bank had remitted money of the drawee bank, instead of issuing exchange therefor, could not money thus diverted be recovered on the principle applicable to a corporate officer paying his debts with checks of the corporation? It is true there is the difference that a bank on which a check or draft is drawn should look out for itself, but, at all events, the currency or acceptance of a cashier's bank draft seems not involved in the question before the court. The real question was whether the draft by the corporation on the bank should be taken at its face value. As money thus paid might not be recoverable, we think the court was correct in holding there could be no recovery for its being paid on the cashier's draft.

PLEA FOR A LESS UNCERTAIN AND LESS VOLUMINOUS SYSTEM OF ALABAMA LAW.*

Is our judicial system in good or in bad shape? Let the following considerations answer.

Diagnosing the Situation in Alabama.—1. The finding by our supreme court that our able, earnest and fair trial judges are unable to correctly interpret the law, as shown by the perpetual stream of reversals. (Fifteen reversals out of the thirty supreme court decisions in the first number of current—68th—volume of Southern Reporter.)

2. The finding by our supreme court that our able, earnest and fair appellate judges are unable to correctly appreciate the principles of our law in that appreciable number of cases decided by our court of appeals, which are likewise reversed by our supreme court.

3. The decisions of our supreme court that it has hitherto been unable to comprehend what is the correct rule in the large number of its decisions, which it has been constrained, of course reluctantly, to overrule.

4. The considerable number of cases wherein the supreme court has, after saying that the law applicable to a given record was *so* and so; on rehearing said that the law was *thus* and so.

5. Such misadventures as our highest court of seven picked lawyers twice reversing *itself*, and also the trial court in the same case, on the very same appeal on the same record; as in the case where it first decided that a standing train, separating firemen, with a properly connected hose, from a burning warehouse on the other side of the track,—was under no obligation to pull, or push, or part; then later decided that it should have given the fire hose right of way; and still later reverted to the stand-pat doctrine, which still stands.

6. The inability of that court to agree on any opinion for the court, though its justices may contribute scores of pages, of their *individual* opinions to our reports; as in the case where a public service corporation's hold on the streets of a small city was declared untenable; then that ruling itself declared untenable.

7. The failure of that tribunal to furnish any opinion as to what the law in a given case is, save by reversing the reading of the dissenting opinion, which is often the only one, thereby, as it were, forcing us to float up and against the current of the River-of-Doubt-Authorities, in order to find where it goes.

8. The frequent spectacle of three, or fewer supreme court judges declaring that four or more judges of that tribunal, are fearfully mistaken as to the law, viz:

"If the law is as it is here decided to be, is it not strange that no text-book writer in England or America has ever been able to learn it? It does seem that such judges and text-book writers as Cooley, Kent, Story, Parsons, Shaw, Gibson, Beasley, Bush, Morawetz, Jaggard, and others of equal note would have found it out, and would not have misled the world-litigants and world-courts for a century or more." Tucker v. Mobile Infirmary, 68 So. 13. Dissenting opinion.

9. Another item of conclusive proof of the almost hopeless uncertainty of our system of law, and, of the near impossibility of our trial courts ruling correctly throughout a trial, is our supreme court's recent rule 45, providing, in effect, that no matter how erroneous may be the trial court's rulings, there shall be no reversals, unless the error has "probably injuriously affected substantial rights of the parties,"—coupled with the said fifty per cent of *recent* reversals.

10. The strongest proof of the chaotic condition of our law is our said committee's interrogation of hundreds of witnesses as to what to do about it.

*[This article is in substance the author's address to the Alabama legislature on the necessity of a permanent code commission.—Editor.]

Codification as a Remedy.—The undersigned hazards the answer: Wipe out our conflicting system of unwritten law, by providing a sure enough Code Commission, to, at least, commence the task of *as far as possible*, plainly and orderly writing down all our law. Write it out!!

Steady as is the growth of our written law, its volume is so small as to make scarcely a showing upon that "five foot book shelf;" while five thousand feet of shelves would scarcely hold the unwritten law, any point of which just any man may be forced to reckon with at any moment.

The very *theory* of the unwritten law, (and the necessity of that theory) that every man is presumed to know the whole business, coupled with the fact that the most erudite sage *can* know only an infinitesimal part of it (which part is liable to be declared at any moment never to have been law at all) sternly demands a supremest effort to clearly express and firmly establish the law within available reach. That demand becomes more peremptory, with the increase of the overwritten, yet unwritten law; for, among the paradoxes of this anomalous system is the fact that the unwritten law is *overwritten*.

Common Law Accidental in its Origin.—Heretical as it may sound, the fact remains that nearly every authoritative expression of a so-called rule of the non-statute law, grew out of an attempt to dispose of some law suit that grew out of some accident. For instance, the accidental stumble of the ancient Englishman that caused him to drop a part of his skull, and to sue the man who fractured it (perhaps accidentally) after he had already sued and recovered judgment previously, for the fracture, created quite a departure, "my Lord Holt" exclaiming: "This is a new case, to which there is no parallel in the books." (A case without a precedent was a nightmare then, and now.) So, it was all a sheer accident that originated the salutary *principle* that you can't have more than one bite at the legal cherry; although when the man sued for the fracture of the skull, he did not foresee that some of it would drop out entirely. From Lord Holt to a suit-case "telescope" is a far cry, yet the accident produced principle supplied a precedent for the North Carolina court to throw out a young woman's suit for mental anguish, against a railroad company, for negligently losing her "telescope" containing her finery that she took along to get married in, because she had compromised a previous suit for telescoping the finery, the court doing this in somewhat non-judicial language, to-wit: "She could carve out as large a slice as the law allowed, *but she could not cut but once.*" Ellner v. Railroad, 3 L. R. A., N. S. 227.

Our adherence to precedent, is shown by the way we search the ox-cart precedents of the era when carts were about the only common carriers by land, in order to ascertain whether a baby is baggage or passenger, when it is negligently allowed to be stolen from a Pullman seat, where the mother had left it sleeping, in order to go to the diner for lunch. Then, on the recrudescence of the primitive, we parade the modern instances to control first principles. Thus, a very rural darky was sued as a common carrier, and was adjudged guilty, as charged, and was denied his rolling stock as exempt, on the idea that a derelict common carrier was a tort-feasor. Considering himself "conjured," to say the least, by such lingo (deemed incantations), appeal to the supreme court was thrice made, in order to raise the spell, and twice refused. The third time was the charm, because a deadly parallel between the accusation against the D. A. R. K. line and the modern L. & N. line raised the levy. Thus we are alternately gripped by the dead hand, and made to grip the live wire.

Strive as we may, we are not always able to follow the precedent-trail, which sometimes degenerates into a sort of squirrel track, and takes up a tree. Frequently, it gets the court "treed." For a long time, any divorcee more sinned against than sinning, was held entitled to dower. Then the

court was stunned by a collision with a double header, viz: just *one* estate beset by *two* widows. The court wondered what would happen should four widows ever lay claim, each to one-third of the lands of just one estate. The grass widow was, therefore, exorcised in favor of the widow in weeds.

Common Law Accidental in Its Development.—Not only is the origin of all the common law, *alias* the unwritten law, *alias* the non-statute, accidental, but so is its development. The accident-produced precedent is quiescent until an accident produces some nearly similar case, to the decision of which the former may furnish a guide. A great many accidents, somewhat similar, yet all different, produce an accidental, and a variant, development of the supposed principle of the original precedent, along different, and conflicting, yet overlapping, lines. Then the differences existing between each one of these subsequently occurring accidents and cases is still another source of perplexity. The so-called principles multiply like a row of "shellots." The resulting principles then diverge, converge, and overlap, and separate, in a series of perpetual variations. When the thing gets "all balled up," so that no sort of super-astuteness is equal to its unravelling, or tracing, efforts become desperate to uproot the original precedent, by attacking the reasoning and reasons upon which it is founded, which attack is always in order. When the slate is wiped clean, the overthrow itself brings dire confusion. We therefore take the overruling case as a new precedent, and thus start a new cycle, with the same sort of train of consequences.

It is largely a matter of choice to say whether one case is, or is not, a precedent for another, on account of the inevitable variations. Then the variations may be termed material and destructive of the character of the so-called precedent, *as such;* or immaterial, and render the precedent controlling, according to the viewpoint, predilections, prejudices, or sympathies of the umpire. All these things, together with the frequently exercised power of pulling up the parent precedent by the roots, destroying all its fruits, flowers, scions, parasites, and neighbors, because of the conclusion that that which was so often declared to be the perfection of human reason is really the quintessence of inhuman folly, leads us to argue that there is more truth than poetry in the phrase "lawless science of our law." Inveighing against the lawlessness of our *people* should go hand in hand with criticisms of the *law's* own lawlessness,—because law means method and system, and we do not find it in our so-called law,—to any great extent. Is it anything of a system that wrenches from son A his devise under his father's will, yet confirms in son B his patrimony devised by the very same clause of the same will,—because the court passed on *his* title after it passed on A's, and, by that time, had discovered its mistake; and that hangs an innocent man by admitting evidence of a dying declaration, and that clears a guilty one under substantially the same circumstances? Is it not rather the whimsical ebullition of an autocrat?

The abstract justice or injustice of the law is of slight moment, compared with its certainty. No striving after justice can achieve its purpose that results in great uncertainty. Any number of cases may be comprehended in a rule that states a *principle*. No case can be comprehended in a rule founded on an accident or transaction composed of many elements, which will never have a complete counterpart, and every variation from which is an invitation to dispute its applicability. We hunt desperately for the case on all fours, only to have it ruled out because it is not a case on *all toes,* and to see the suit ruled by the case that is not even on three legs with that on trial.

We hear much about freak legislation; but what freakishness could exceed that of the common law's fiction of fines and recoveries, and of

characters as mythical as Jack the Giant Killer, Jack, of the Bean Stalk, etc.? Those passed with childhood, but Jack Doe, Dick Roe *et al.*, with pretenses of leases, demises, etc., survived the childhood of our race and era, and stalk through our halls of justice to-day. While the firm of Doe and Roe are about all the legendary heroes now in business, there are numerous fictions, pretenses and suppositions that are ours by inheritance, and by no means moribund; and we are still forced to handle the case of day before yesterday with the tools of century before last.

The unwritten law is an autocrat more absolute than the Czar of all the Russias ever was. It can decide an *original* case just any way it pleases, by saying that reason lieth this way or that. After that, it can decide all similar cases the same way by citing the original case as a precedent; or differently, by differentiating minor or other points of departure. It can get away from the original, not only by distinguishing, but by engrafting exceptions upon the original rule. Often the rule may slay its thousands, but the exception its tens of thousands. Then there is that ghastly and growing army of overruled cases, which never were law, else they could never have been overruled, and the acts done thereunder were not lawfully done, but may have been criminal. For instance, by virtue of the common law in Alabama, a common law marriage is (or rather has been) valid here. Should the court overrule the validating precedents it would mean the confiscation of millions of dollars worth of property, and would involve consequences far worse. Previous to the overruling of a precedent, none but the immediate parties to the suit are supposed to know, and few others do know, that any such step is proposed; although the decision may be more far-reaching, as affecting them, than with reference to the parties litigating.

The Certainty of Statute Law Versus the Uncertainty of the Common Law.—One relying on a duly enacted *statute* is anchored in absolute safety; while one relying on the most solemn, and unanimous, and most repeatedly affirmed *decision*, is forever tossing on the River of Doubt, and liable to be engulfed or stranded, by its sudden sinking or evaporation, or by its reverse current. A duly enacted law forever dominates everything to which it is applicable that is done intervening its enactment and repeal. A duly *decided* law becomes without the slightest effect during the period intervening its promulgation and repudiation, except it serve as an invitation to that which is later declared lawlessness.

In business, politics, sectarianism, and scholasticism, the right of those treated unjustly, to withdraw, is the safety valve. There can't be any withdrawal in law. There must be, then, comparative perfection. There must not be a just grievance *against the law;* because just grievances means, sooner or later, a "higher law." Law must lead everything in its approach to complete perfection and efficiency, or chaos will wait for us just over the hill. There is no perfection or efficiency without system; nor system without rules; nor rules without classification, and terse, clear statement. Rules that are capable of being followed are incapable of being formulated by voluminous and argumentative opinions that are often rambling and obscure, and that are modified, or explained, limited or doubted, or are discredited by trenchant dissenting opinions that accompany them,—which situation is as anomalous as the proclamation of the sovereign's edicts, followed closely by an official herald, declaring the edict contrary to the welfare and ancient custom of the realm. But those emasculating features are themselves part of the precedent system. Our complex civilization cannot endure the shifting uncertainties of unwritten law, which is suited only to the simple childhood of a race that, largely, can't read, and must, perforce, depend upon word-of-mouth traditions.

The British Constitution is unwritten, though most of the British law is now

written. We may say that, then even the "common law constitution" was unwritten; and a written constitution was first pronounced ruinous and radical. No one has ever essayed to tell why written laws are not as important as written constitutions; nor why we should not have written rules of criminal evidence, as well as written rules of other criminal law; nor why it is not as necessary to write down in statutory form, what a man shall not do *civilly*, as well as *criminally*. It is a difference in degree, and not in kind, and one is simply a bigger job than the other. Are we too lazy to tackle it?

It must be confessed that while our double-barreled system of statute and non-statute law is the antithesis of system, by virtue of its mongrelism, the written part has little more system than the unwritten. For instance, we find that we need a law to cover an offense or an emergency, to deal with which we are unequal. There may already be a law enveloping the subject, but we are blissfully ignorant, so turn lawsmith. Then we desire some little statute in order to crystallize some admirable principle adhering to some precedent, (as a rare embryo pearl to a mussel shell) ere it evaporates in mist; or, else, to lay some anomalous, "unwritten," troublesome, ghost. For instance: "Should we follow the court of Rhode Island, when the decision of that court *was deemed so bad by the people that they rid themselves of it by an express statute?*" Tucker v. Mobile Infirmary, 68 So. 13, 14, dissenting opinion.

Systematized vs. Unsystematized Statute Making.—Numerous similar, or, yet different statutes on the same subject, throw just as dangerous a monkey wrench into the legal machinery, as numerous similar, yet different, precedents. In fine, all our law originates in locking the door after the horse is gone, and in equipping each door with a different lock, of different combination, time adjustment, and key, and yet leaving unlocked every door through which no horse has ever been stolen. A permanent code commission would act as a board of locksmiths and guards, and see that all doors are equipped, and that the equipment be kept in systematic, and co-ordinated order.

The so-called code that we have issued every ten years professes some sort of arrangement and classification; but the result is about equal to a house built of remains of an old one, and of timbers and lumber prepared by Tom, Dick, and Harry, throughout ten years of experimenting, without plans or specifications as to the quality, material or dimensions. Each succeeding code commission is governed by a set of different legislative directions, about how to tear down the old structure, and rebuild, so as to work in all the random pieces thrown around during the previous decade. Each code commissioner has his own notions, and each code commissioner's work is gone over by a joint legislative revisory committee that gallops through its pages in record time, hurling something at some sections, and hooking something out of others, resulting, on the whole, in some "such stuff as dreams are made of."

Looked at in another way, our so-called (incomplete) code, cutting into the common law here, there, and yonder, suggests random sections of a bridge, on random levels and lines, towering about the River of Doubt, and reachable, some of them, only by raft, some by swimming and the rest by wading.

Need of a Permanent Code Commission.—We are going to have statutes. No legislature ever failed to add to the sum total, which mostly bear the hall-mark of Roderick Random. We should, by a commission, attempt to select and furbish up a complete stock, for all time, though duly conscious that there is nothing perfect under the sun which is, itself, infested with a variegated assortment of spots. Objections to a rational systemization of all the law should explain why, if it is essential to codify the criminal law, the negotiable instrument law, the municipal corporation law (as we have already done) and all the

partnership law, the sales of goods law, and all the corporation law, as England has done,—it is not also essential to codify, as far as human wisdom and foresight can do, absolutely all the law,—as every non-English speaking civilized country, and as a number of states, have done.

The objection that the precedent system would overrun a complete code is a reflection on our courts. That they are not always able to navigate the River of Doubt that "crosses" every other current of law, does not justify the baleful prophecy that when it is properly canalized, the court will blow up the locks. What though the precedent system does hamper the statutes, would you on that account repeal the statute against frauds, and those against the Rule in Shelley's case, and against ticks? But the statutes are very few with which the courts undertake to play horse. Those inveighing against the radicalism of a complete statutory system usually demand several statutory innovations of decided originality. Their logic would permit sporadic and random statutes to cover, *one at a time*, all the law; but deprecate any sort of an attempt at a *systematization* of the *whole*. One of their main objections to a code is that the law would be so plain and easy that the faculties of reason and resourcefulness would atrophy. It might as well be urged that substituting for the dangerous and winding ford a modern bridge, and that dredging a wide, deep channel across the treacherous shoals, would dull the edge of the cunning of pilots and guides; but, in any event, business would be expedited, efficiency enhanced, and fewer people would get drowned. It is objected that the adoption of just one pet rule of practice, or the enactment of just one statute or two, would put everything to running just right. We have tried such devices, steadily, for over twenty-five years. We have doctored the horses, put all sorts of check reins on them, and painted the vehicles and manicured the harness, when we ought to have been piking the road, or building a new one. That the vehicle has become foundered, and the horses got in too deep, is the fault of the *"highway."*

E. W. GODBEY.

Decatur, Ala.

BANKS AND BANKING—KNOWLEDGE OF PRESIDENT AS NOTICE TO BANK.

SMITH, et al., v. MERCANTILE BANK, et al.

Supreme Court of Tennessee. June 5, 1915.

177 S. W. 72.

Where the president of a bank used his mother-in-law's notes, deposited with him for collection, as security for a loan, which he, as president and acting for the bank, made to himself on his own note, he alone acting in the transaction, notice of the character of the notes as a trust deposit was imputed to the bank, since, although where an agent acts in fraud of his principal such agent's notice of the character of the transaction will not be imputed to the principal, nevertheless where such agent, as in the instant case, is the sole representative of the principal in the transaction, the principal is chargeable with notice; there being no room under the facts for the presumption that the agent dealing with his principal on his own account will not communicate his knowledge when it is to his interest to conceal it.

Certiorari to Court of Civil Appeals.

Action by C. D. Smith and others against the Mercantile Bank and others. Judgment for plaintiffs, and defendants petition for certiorari. Denied.

R. P. Cary, of Memphis, for petitioners. Caruthers Ewing, of Memphis, for defendants.

GREEN, J. In this case Jo. L. Hutton, receiver, is winding up the affairs of the Mercantile Bank, an insolvent corporation. Mrs. Belle K. Allison filed an intervening petition to recover from his possession certain notes which came into his hands as receiver of the said bank. There was a decree in her favor by the chancellor which was affirmed by the Court of Civil Appeals, and the case is before us on petition for certiorari.

Petitioner is the mother-in-law of C. H. Raine, formerly the president of the Mercantile Bank. She turned over to her son-in-law a hundred notes for $100 each, known in the record as the College of Physicians and Surgeons' notes. These notes were turned over to Mr. Raine by Mrs. Allison, to be collected by the bank and placed to her credit there, as they matured. Mr. Raine put them in his box in the bank vault. Some of them were col-

lected and passed to the credit of Mrs. Allison's account.

Later, the remaining notes were appropriated by Mr. Raine and placed as collateral security to a note of $21,510.50, which he individually had negotiated with the bank.

The receiver contends that the bank became an innocent holder of the said notes, and that he is entitled to hold them, notwithstanding Mr. Raine's fraud.

The receiver also insists that this case is an exception to the rule that knowledge or notice on the part of the agent is to be treated as notice to his principal, for the reason that in this transaction Mr. Raine's interest was adverse to the bank and he represented himself, and not the bank, in putting up Mrs. Allison's notes as collateral security for his note.

The principal is not ordinarily charged with the knowledge of the agent in a matter where the agent's interests are adverse to those of the principal. The rule that the principal is charged with the agent's knowledge is founded on the agent's duty to communicate all material information to his principal, and the presumption that he has done so. Such a presumption, however, cannot be indulged where the agent is acting in his own behalf, when his interest is antagonistic to that of the principal, "and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature." 3 R. C. L. 479. See, also, Wood v. Green, 131 Tenn. ——, 175 S. W. 1139; Provident, etc., Assur. Society v. Edmonds, 95 Tenn. 53, 31 S. W. 168; 2 C. J. 868.

If Mr. Raine had negotiated these notes of Mrs. Allison with any other officer or agent of the Mercantile Bank, the case would fall, no doubt, within the exception to the general rule that a principal is affected with the knowledge of his agent, and inasmuch as Mr. Raine was acting in his own behalf and interest, antagonistic to the bank, the bank would not have been charged with his knowledge of the fact that he was fraudulently misappropriating his mother-in-law's securities.

In this case, however, it does not appear that any agent of the bank figured in this transaction except Mr. Raine alone. He appears to have made this loan to himself, and he, acting for the bank, appears to have accepted his own note and the collateral he offered with the note. This is plainly inferable from the record. The answer of the receiver discloses a memorandum made by Mr. Raine himself in which he ordered Mrs. Allison's notes to be collected and credited on his own note. He acted both for himself and the bank in the transaction.

Under these circumstances, the weight of authority is said to be "in favor of a qualification of the foregoing exception so as to exclude therefrom, and therefore to bring within the general rule, which charges the principal with the knowledge possessed by the agent, cases where the officer, though he acts for himself or for a third person, is the sole representative of the corporation in the transaction in question."

See note to Brookhouse v. Union Pub. Co., as reported in 2 L. R. A. (N. S.) 993, 994.

There is said to be no room in such a case for the presumption that an agent, dealing with his principal on his own account, will not communicate his knowledge when it will be to the agent's interest to conceal that knowledge. If the agent is the sole representative of the principal in the transaction with himself, there is no one to whom he can communicate his knowledge, nor any one from whom he might conceal it.

"If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interest, however much his conduct may have been. He necessarily knew as much in one capacity as he did in the other." First Nat. Bank v. Blake (C. C.), 60 Fed. 78.

See Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888, and numerous cases collected in a note under Lilly v. Hamilton Bank, as reported in 29 L. R. A. (N. S.) 558, 562.

So, in this case, applying the authorities to the facts stated, we think the bank was charged with knowledge of Raine's lack of title to the notes of Mrs. Allison, and the bank was not an innocent holder of the said notes.

Petition for certiorari denied.

NOTE.—*Exception to Rule of No Imputation of Knowledge of Agent to Principal, Where Agent is Personally Interested.*—The rule of non-imputation of knowledge of agent to his principal where the former acts only in furtherance of his interest is itself an exception to the general rule on this subject and the inquiry is whether or not there is an exception to this exception. Whether really it should thus be denominated may be doubted. That is to say, take the situation in the instant case and the owner of the pledged notes was not represented. Virtually there was a taking by an officer of the bank, in apparent scope of his authority, notes in the same way as if he had found them. There would be in such case no double agency, and the owner recovers her lost property unaffected by acts of the finder in regard thereto. The business, that the abstractor or finder of the property does with the bank rests upon the basis of his right to pledge what he has abstracted or found.

It might be urged that this same reasoning

would apply in such a case as Lilly v. Hamilton Bank, 178 Fed. 53, 102 C. C. A. 1, 29 L. R. A. (N. S.) 558, but no, because there was apparent authority for the holder of paper to deal with another person in regard to it, and this was all he did. He was not given any authority to advance money upon it to himself, and, if he had been invested with authority by a corporation to buy it or take it as collateral, still the corporation is thereby its officer to deal with some other person than this officer. It can never lose its presence if it acts, but whoever is back of the officer on the other side is not there as acting. It makes itself present by acting in acceptance of the paper as collateral. As the Lilly case pointed out, the transaction was saved to the bank only by the officer who made offer to the paper retiring from the meeting of the discount committee when it proceeded to act on the paper as offered to the bank.

In the Lilly case it is said: "There are cases which hold that knowledge of the illegality of a note by a bank director acting with the board or committee of the bank at the time of the purchase or discount of the note by the bank is imputable to the bank, while such knowledge by a director who is not present and does not act with the board or committee when the note is purchased or discounted is not imputable to the bank." Then the court observes that: "If this distinction is sound at all, it has no application where the director is transacting business with his bank for himself and in its transaction conceals facts which, if made known to the bank, would defeat his purpose." It can not be the act of the director, either alone or conjointly with others, that brings the bank into the transaction.

But there are a few cases holding the other way on this proposition. For example, Findley v. Cowles, 93 Iowa, 391, 61 N. W. 998, where knowledge was not imputed to the bank, because it was said the agent, who alone acted for the bank, was dealing with himself. But he does not deal with himself as qualified to act in the matter. He had no knowledge as custodian that was not possessed by the bank when it acted.

Brookhouse v. Union Pub. Co., 73 N. H. 368, 62 Atl. 219, 2 L. R. A. (N. S.) 903, leads to the conclusion that the exception of nonliability of the bank does not apply when the officer of the bank is its sole representative in the transaction, nor where, if it were not chargeable with notice, it would be in a better position than had the transaction never have taken place. It cannot retain any benefit regarding the transaction as a whole and not merely in regard to that part of the transaction which is favorable to the bank. In the Brookhouse case there was merely deposit of funds and the only benefit the bank derived was merely the incidental use of the money for a short time. This was the same kind of an independent act by the officer as had an outsider have done the same thing. But we repeat, that the bank must be represented by another officer than the one committing a fraud, or the other side is not represented at all, and what it gets hold of it gets with full knowledge that it could not obtain had the other side have been represented. The ordinary exception, that is the exception to which an exception or proviso is now spoken of, is too well known to need any citation of authority. C.

ITEMS OF PROFESSIONAL INTEREST.

THE STORY OF THE CALIFORNIA BAR ASSOCIATION.

It was not until the year 1909 that California was able to organize and establish a successful State Bar Association. Prior to that time one or two other efforts had been made in this direction but had proven unsuccessful either on account of their limited membership or because of their strictly local support.

On November 10, 1909, there assembled at the St. Francis Hotel, San Francisco, lawyers from all parts of the state of California, who came in response to an invitation sent out through the San Francisco Bar Association. The avowed purpose of this meeting was the organization of a State Bar Association for California. Mr. Emil Pohli, of San Francisco, called the meeting to order and welcomed those present on behalf of the San Francisco Bar Association. Mr. Lynn Helm, of Los Angeles, then nominated the Honorable Curtis H. Lindley as temporary chairman and Mr. Grant H. Smith, of San Francisco, nominated T. W. Robinson, of Los Angeles, as temporary secretary.

The constitution and by-laws, as adopted, was an effort to combine the lawyers of the various parts of the state in one organization, whose membership should consist not only of the individual members of the association, but representatives of the various local county and city bar associations throughout the state. To this end, it was provided that delegates from various local associations (called constituent associations) and the individual members of the association should each have an equal vote in the proceedings of the association.

The matter of the constitution and by-laws was carefully considered for more than two days, at which time the draft presented by the committee, after having been amended several times, was adopted and submitted to the members for their approval, and the association elected as its officers for the first year, the following members:

President, Curtis H. Lindley, of San Francisco; secretary, Ernest J. Mott, of San Francisco; treasurer, T. W. Robinson, of Los Angeles.

The first annual meeting of the association was duly held at Blanchard hall, Los Angeles, California, December 6-7, 1910. Curtis H. Lindley presided.

The reports of the various sections and committees showed that the membership had increased and that the work of the association had been taken hold of in earnest. All the sections and committees reported, and many amendments to the laws of the state, both substantive law and procedure, was proposed. The discussion by the members of the various questions and reports was earnest and the proceedings of this meeting covered nearly three hundred and fifty pages of printed report, called "The Proceedings of the First Annual Convention of the California Bar Association."

The following officers were elected for the year 1910-11: President, Lynn Helm, Los Angeles; secretary, T. W. Robinson, Los Angeles; treasurer, H. C. Wyckoff, Watsonville.

The proceedings of the second annual convention of the California Bar Association, which was held at Sacramento, November 13-14-15, 1911, is contained in a printed report, comprising two hundred and ten pages.

The session closed with a banquet tendered by the Sacramento Bar Association, and the election of the following officers for the year 1911-12: President, C. E. McLaughlin, Sacramento; secretary and treasurer, same as previous year.

The proceedings of the third annual meeting of the California Bar Association, contained in three hundred and sixty pages, show that this meeting at Fresno, November 21-22-23, 1912, was especially interesting in the matter of reports of committee proposing amendments to civil procedure and substantive law.

The usual banquet was enjoyed and at the close of the session the following officers were elected for the year 1912-13: President, M. K. Harris, Fresno; secretary and treasurer, same as previous year.

The proceedings of the fourth annual convention of the California Bar Association is contained in a report of two hundred and ten pages, which shows that the convention convened November 20th, at San Diego, with all officers present and a large attendance. This meeting is especially remembered by the elaborate entertainment given the association by the San Diego bar.

A delightful banquet was enjoyed at the Hotel Coronado. The following officers were elected for the coming year, 1913-14: President, William J. Hunsaker, Los Angeles; secretary and treasurer, same as previous year.

The fifth annual convention of the association was held at Oakland, California, November 19-21, 1914. The proceedings of this meeting of the association are contained in a printed report of two hundred and seventy-five pages, showing that the association has steadily increased in membership and influence, and the report of these proceedings show delegates from many county bar associations.

The following papers were delivered: President Wm. J. Hunsaker's annual address, subject, "The Courts, the Bar, and the People." One evening was given over to an open court, at which Honorable Matt I. Sullivan, chief justice of the Supreme Court of California, delivered a paper entitled, "The Law's Delays and Remedies Suggested." This was followed by a general discussion by the members present. The annual address was delivered by Honorable Walter Bordwell; subject, "The Judges of Our Courts." Paper, "The Place of the Public Defender in the Administration of Justice," was delivered by Honorable Walton J. Wood, of Los Angeles, first public defender in the state of California.

One of the most interesting features of the annual meeting was the memorial held for William H. Beatty, late chief justice of the Supreme Court of California. At this meeting a committee consisting of Honorable F. W. Henshaw, Garret W. McEnerney, Honorable Benjamin F. Bledsoe, Honorable M. C. Chapman and Honorable Wheaton A. Gray presented memorial resolutions, after the adoption of which Charles S. Wheeler, of San Francisco, delivered a memorial address.

The usual banquet was enjoyed by the association and a visit to the Panama-Pacific Exposition fair grounds. The place of next meeting was left open, awaiting the decision of the American Bar Association as to a time and place of its next annual meeting, and the following, who are the present officers of the association, were elected: President, R. M. Fitzgerald, Oakland; treasurer, H. C. Wyckoff, Watsonville; secretary, T. W. Robinson, Los Angeles.

The next annual meeting will be held at San Francisco, August 23-24-25, and the week from the 23d to 28th, has been set apart as lawyers' week at the Panama-Pacific Exposition, and a large attendance is expected at this coming meeting.

R. M. Fitzgerald was born January, 1858, in San Francisco. Received his early education in the Oakland High School, and later attended the University of California, graduating therefrom May 23, 1883, with degree of L. L. B. The same year was admitted to practice by the supreme court of this state, and commenced active practice of his profession in 1883, in

Oakland. Is now senior member of the firm of Fitzgerald, Abbott & Beardsley, with offices in the Oakland Bank of Savings Building, Oakland, California.

The California Bar Association is to be congratulated on its very successful career and the large influence it has exerted over the practice of the law in that great state.

A. H. ROBBINS.

BOOK REVIEW.

BURDICK ON REAL PROPERTY.

Mr. Wm. L. Burdick, L.L. B, of Yale, and author of several works on legal subjects, and Contributor to Cyc., presents his Handbook of the Law of Real Property and it is included by the publishers in their Hornbook series.

Mr. Burdick has been a teacher of real property law for more than twenty years, and this one-volume work is an effort to include only the fundamental principles of this subject, it being recognized that such a limitation leaves little room for personal theories and discursive digressions.

This volume, prepared under such view, is an excellent presentation of the subject, and while beneficial to the student is also useful for the practitioner in its modern application of fundamental principles. To accomplish this double purpose, in a field like this, is an achievement well worthy of note. This work is replete with citation of cases used as authority to support a clear and succinct statement of principles, all proceeding in logical arrangement to the end.

The volume contains nearly 1,000 pages, in excellent type, in binding of law buckram, and hails from the home of the Hornbook series, that is to say, West Publishing Company, St. Paul, Minn., 1914.

BOOKS RECEIVED.

Evolution of Law: Select readings on the origin and development of Legal Institutions. Vols. I. and II. Sources of Ancient and Primitive Law. Compiled by Albert Kocourek, Professor of Jurisprudence in Northwestern University, and John H. Wigmore, Professor of Law in Northwestern University. In three volumes: price, $12.00. Boston, Little, Brown & Co. 1915. Review will follow.

HUMOR OF THE LAW

At the Capitol one day a California Representative was discoursing on the sport of fishing for tuna off the Pacific Coast.

"We go out in small motor boats," said the Representative, "and fish with a long line baited with flying fish. Anything less than a hundred-pound tuna isn't considered good sport."

Just tnen a colored mesenger, who had been listening, stepped up.

"'Scuse me, suh," said he, wide-eyed, "but did I understand yo' to say dat yo' went fishin' fo' hundred-pound fish in a little motah boat?"

"Yes," said the Congressman, with a smile, "we go out frequently."

"But," urged the darky, "ain't yo' 'feared yo' might ketch one?"—Houston Chronicle.

Shortly before his death, the late Chief Justice Fuller presided at a church conference. During the progress of a heated debate a member arose and began a tirade against universities and education, thanking God he had never been corrupted by contact with a college.

"Do I understand the speaker thanks God for his ignorance?" interrupted the Chief Justice.

"Well, yes," was the answer; "you can put it that way if you want to."

"All I have to say then," said the Chief Justice, in his sweetest musical tone, "is that the member has a good deal to thank God for."—Pathfinder.

John Doe, having taken a recent bar examination, was asked by his friend Richard Roe, how he came out, to which Doe replied:

"Well, I wrote Little on Mortgages and Trust Deeds, Moore on Facts, and Long on Domestic Relations. I Fell on Guaranty and Suretyship and was Fuld on Police Administration, but Keener on Corporations. I got Wise on American Citizenship, but was Poor on Referees under the Code System. My Spelling on Trusts and Monopolies ranked me High on Injunctions and May on Insurance. I took a Knapp on Partition, was Tarde on Penal Philosophy, but started the Ball on National Banks and did my Best on Evidence. I was Hale on Torts, turned Gray on the Rule against Perpetuities, got Dropsie on Roman Law of Testaments and pulled through by a Hare on Contracts."—Case and Comment.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Color of Title.—A deed of a married woman without private examination is, if otherwise sufficient, color of title.—King v. McRacken, N. C., 84 S. E. 1027.

2. **Attorney and Client**—Imputed Notice.—Knowledge of the pertinent facts received by an attorney while in the authorized particular service of his client is imputed to the client.—John Silvey & Co. v. Cook, Ala., 68 So. 37.

3. **Bankruptcy**—Chattel Mortgage.—Preferential chattel mortgage on merchandise held not good for amount of prior mortgage, where sales had been permitted and it did not appear that any of the property originally mortgaged was in existence.—Stockgrowers' State Bank of Mountain Home v. Corker, U. S. C. C. A., 220 Fed. 614.

4.——Estoppel.—Creditor, whose partnership with bankrupt was terminated prior to pretended sales of interest in another firm, held not estopped from objecting to the bankrupt's discharge because of the concealment of such interest.—In re Hagy, U. S. C. C. A., 220 Fed. 665.

5.——Mortgages.—Plaintiff, who held a chattel mortgage on the property of a bankrupt, delayed filing his mortgage. In the meantime others extended credit. There was a second chattel mortgage, which was expressly subject to that of plaintiff, and likewise there were general unsecured creditors whose debts were incurred before plaintiff's mortgage was given. Held, that subsequent creditors had priority; that plaintiff then had priority to the extent of his mortgage above the claim of such creditors; that next came the second mortgagee; and that after the bankrupt claimed his exemptions plaintiff and the other general creditors were entitled to the remainder.—Hollenbeck v. Louden, S. D., 152 N. W. 116.

6.——Preference.—Chattel mortgage, taken by president of bank for loan made to bankrupt with which to pay indebtedness to bank, held a preference within Bankr. Act, § 60b.—Marsh v. Walters, U. S. C. C. A., 220 Fed. 805.

7.——Renewal Note.—Banker held entitled to transact business with customer in the ordinary way, take renewal notes, and receive partial payments, and to assume that the customer is solvent, and not liable to restore payments when bankruptcy intervenes.—Grandison v. Robertson, U. S. D. C., 220 Fed. 985.

8.——Schedules.—Omission of a small amount of furniture from bankrupt's schedules without fraudulent intent held not ground for denying a discharge.—Baker v. Bishop-Babcock-Becker Co., U. S. C. C. A., 220 Fed. 657.

9. **Banks and Banking**—Cashier's Check.—The holder of a cashier's check may sue the bank as maker without joining the payee or indorsers.—Bank of Statham v. National Bank of Athens, Ga., 84 S. E. 966.

10. **Bastards**—Child as Evidence.—The weight of authority seems to authorize the exhibition of a child to the jury in bastardy as evidence of its parentage.—Sims v. State, Ga., 84 S. E. 976.

11. **Bills and Notes**—Estopped.—Indorsers impliedly assenting to conduct of maker as to property covered by a chattel mortgage to payee held estopped from insisting that they were injured by loss through maker's mismanagement of the proceeds.—Columbus State Bank v. Erb, Mont., 147 Pac. 617.

12.——Delivery on Condition.—A note delivered on condition that it shall be ineffective unless signed by another as co-maker cannot be enforced by the payee unless so signed.—First State Bank of Eckman v. Kelly, N. D., 152 N. W. 125.

13.——Extension.—One signing a note on the back thereof before delivery is liable, though time of payment be extended, unless he shows that he signed as surety, and payee knew that fact.—Bank of Inman v. Elliott, S. C., 84 S. E. 996.

14.——Innocent Purchaser.—The maker of mortgage note, induced by false representations to sign another note, held bound for payment of both in the hands of innocent purchasers.—McCowen v. Barnett, La., 68 So. 102.

15.——Stolen Note.—That a negotiable instrument was stolen from maker before delivery held, under Rem. & Bal. Code, § 3407, not to prevent recovery by holder in due course.—Angus v. Downs, Wash., 147 Pac. 630.

16.——Waiver.—Defense of forgery of indorsement on a note held not waived, where the purported indorser promptly declined to pay, but did not lead the holder to believe that he would not rely on any legal defense.—In re Skinner's Will, Wis., 152 N. W. 172.

17. **Boundaries**—Courses and Distances.—Where boundary was described as following old river-bed, such bed, substantially meeting the calls in conveyances, held to control over courses, distances, and acreage.—Martin v. Frazier, Iowa, 152 N. W. 14.

18. **Brokers**—Specific Performance.—Where real estate brokers employed to purchase property took an option in their own name, there was a breach of faith and conveyance having been made to the principal, they are not entitled to specific performance.—Pace v. Cline, Colo., 147 Pac. 672.

19. **Carriers of Passengers**—Evidence.—Proof of running of passenger train through open switch into collision with standing cars held to justify jury finding of breach of carrier's duty and contract.—Lee v. Kansas City Southern Ry. Co., U. S. C. C. A., 220 Fed. 863.

20. **Cemeteries**—Special Damages.—In an action for desecration of a burial ground, special pecuniary damages are recoverable for injury to peace and happiness.—O'Neal v. Veazey, Ga., 84 S. E. 962.

21. **Chattel Mortgages**—Constructive Notice. —A chattel mortgage of record in the auditor's office, unsatisfied of record, of itself works constructive notice of the incumbrance to those acquiring interests in the property subsequent to the recording.—University State Bank v. Steeves, Wash., 147 Pac. 645.

22. **Constitutional Law**—Due Process of Law. —The statute providing for establishment of drainage districts upon notice by publication is not unconstitutional as authorizing the taking of property without due process of law.—Goeppinger v. Boards of Sup'rs of Sac, Buena Vista, and Calhoun Counties, Iowa, 152 N. W. 58.

23.——Due Process of Law.—Persons taxed as prosecutors with the costs of a malicious prosecution after notice, but without opportunity to present their defense, were not given a hearing according to the law of the land.—State v. Collins, N. C., 84 S. E. 1049.

24. **Contracts**—Breach.—One party to a contract need not put the other in default before suing to enforce it.—Healy v. Southern States Alcohol Mfg. Co., La., 68 So. 132.

25.——Breach.—An absolute renunciation of a contract by one of the parties thereto constitutes a breach thereof relieving the other from performance of his promise or covenant.—Lewis v. West Virginia Pulp & Paper Co., W. Va., 84 S. E. 1063.

26.——Equity.—Equity will presume fraud from dealings with a person manifestly intoxicated, and will afford relief if he was imposed upon.—Burch v. Scott, N. C., 84 S. E. 1035.

27.——Equity.—Under an agreement whereby complainant borrowed money from defendant, providing that on any default the whole principal should become due, held, that a court of equity could not deprive the lender of the benefit of the provision for prompt payment of interest.—Roche v. Hiss, N. J., 93 Atl. 804.

28. **Copyrights** — Statutory Compliance. — Where, in place of the copyright notice permitted by Copyright Act, § 18, there was a blurred and indistinct mark, held, that there was an omssion of the notice within section 20 as to damages.—Strauss v. Penn Printing & Publishing Co., U. S. D. C., 220 Fed. 977.

29.——Subject of.—Forms of advertisements for use by dealers which were misleading and contained untrue statements held not copyrightable, and use thereof not an infringement of a copyright.—Stone & McCarrick v. Dugan Piano Co., U. S. C. C. A., 220 Fed. 837.

30. **Corporations** — Breach of Contract. — Where a corporation issued stock to a stockholder on condition that he would finance the corporation, his failure to do so was a breach of contract, and he could not avoid liability by showing that he had made a contract with another to furnish the money.—Cerro Cobre Development Co. v. Duvall, Ariz., 147 Pac. 695.

31.——Dissolution.—A corporation is not dissolved nor divested of its property because one acquires practically all its stock, so that it cannot legally conduct its business as a corporation for want of requisite number of stockholders, but becomes for the time being dormant, and such stockholder cannot transact business in the name of the corporation and bind it thereby.—Lang v. Lundy, Mich., 152 N. W. 78.

32.——Election.—Where a corporate stock is sold on a written contract binding the sellers, at option of the buyer, to repurchase four years later, the buyer, on electing to resell, may recover the contract price though he delayed a year on defendant's representations.—Echternach v. Moncrief, Kan., 147 Pac. 860.

33.——Reorganization.—Reorganized corporation, which purchased property of old corporation subject to mortgages at receiver's sales, held not liable for deficiency upon foreclosure.—Equitable Trust Co. of New York v. United Box Board & Paper Co., U. S. D. C., 220 Fed. 714.

34.——Share of Stock.—A share of capital stock is known as a chose in action, being the interest or right which the owner has in the management of the corporation, in its surplus profits, and in its assets after dissolution.—Hook v. Hoffman, Ariz., 147 Pac. 722.

35. **Counties**—Non-Negotiable Warrants.—Assignee of non-negotiable county warrants without notice of any agreement between county and assignor held subject only to equities existing between the county as the original obligor and the payees or obligees.—Palmetto Nat. Bank v. Lexington County, S. C., 84 S. E. 1006.

36. **Courts**—Rule of Property.—Decisions defining the rights of riparian proprietors are a rule of property, and will not be overruled.—Miller & Lux, v. Enterprise Canal & Land Co., Cal., 147 Pac. 567.

37.——Situs.—All property must have a situs which governs the jurisdiction of courts over it; that of real property being always fixed, of tangible chattels being the place where they happen to be, and of ordinary choses in action being the owner's domicile.—Hook v. Hoffman, Ariz., 147 Pac. 722.

38. **Criminal Law**—Accomplices. — Women transported from one state to another for an immoral purpose are not accomplices to the offense of transporting them and furnishing tickets for their transportation.—Diggs v. United States, U. S. C. C. A., 220 Fed. 545.

39.——Presence of Accused.—After conviction and final judgment, accused need not be present when an order is made permitting withdrawal of certain papers used as evidence and directing filing of certified copies thereof.—State v. Hoke, W. Va., 84 S. E. 1054.

XUM

40. **Damages**—Accident.—Where germs entering accidental cut in wrsit would have done no harm had employe not engaged in boxing bout, accident held not the proximate cause of disability within St. 1913, § 2394m3.—Kill v. Industrial Commission of Wisconsin, Wis., 152 N. W. 148.

41.——Proximate Cause.—Breaking of plaintiff's leg in hospital caused by his want of due care was not an element of recovery against defendant in an action for personal injuries caused by plaintiff's being struck by defendant's automobile.—Taxicab Co. of Baltimore City v. Emanuel, Md., 93 Atl. 807.

42. **Death**—Comity.—Actions on death statute of one state held maintainable in another state, unless the statute is inconsistent with the statutes or public policy of the state in which the action is brought.—St. Bernard v. Shane, U. S. C. C. A., 220 Fed. 852.

43. **Deeds**—Construction.—Conflicting clauses in a deed should, if possible, be reconciled, and if this cannot be done the clause first appearing must control to the exclusion of a later one.—Robertson v. Robertson, Ala., 68 So. 52.

44.——Equity.—Where by fraud land was obtained for an inadequate consideration, a court of equity will set aside the transaction.—Kirby v. Arnold, Ala., 68 So. 17.

45. **Dismissal and Nonsuit**—Retraxit.—A "retraxit" is technically the voluntary acknowledgment made in open court by the plaintiff that he has no cause of action and will proceed no further.—Fulton v. Ramsey, W. Va., 84 S. E. 1065.

46. **Dower**—Assignment.—Where a widow fails to procure an assignment of her dower, heirs, unless precluded by their acts, may sue in equity to have such dower assigned.—Robertson v. Robertson, Ala., 68 So. 52.

47. **Electricity**—Res Ipsa Loquitur.—Where an electric company agreed that the current transmitted inside a building should not exceed 119 volts, the happening of an accident from a powerful current makes out a prima facie case of liability.—Shaw v. North Carolina Public Service Corporation, N. C., 84 S. E. 1010.

48. **Eminent Domain**—Jury.—The jury of freeholders in expropriation proceedings is a specially constituted body, not empowered to try the whole issue, but merely to decide such questions as statute, in creating it, has given.—Orleans-Kenner Electric Ry. Co. v. Metairie Ridge Nursery Co., La., 68 So. 93.

49. **Equity**—Clean Hands.—The principle that he who comes into equity must do so with clean hands defeats a complainant only when his iniquity consists of wrongful conduct in the particular transaction which raises the equity he seeks to enforce.—Talbot v. Independent Order of Owls, U. S. C. C. A., 220 Fed. 660.

50. **Estoppel**—Liability.—In action against county upon county warrants, pledged with plaintiff by one whom the county had authorized to acquire such warrants under an arrangement unknown to plaintiff, held that as the county made it possible for the third person to do the injurious act, it should bear the loss.—Palmetto Nat. Bank v. Lexington County, S. C., 84 S. E. 1006.

51. **Evidence**—Books and Papers.—A railroad yardmaster can testify as to the weight of a car of grain from the original card entry made by the conductor who weighed the grain, though the yardmaster was not present at the time, and did not know the conditions under which it was weighed.—Remer v. Goul, Mich., 152 N. W. 91.

52. **Frauds, Statute of**—Evidence.—Where a written order for goods not accepted in writing, does not show on its face that they were yet to be manufactured, parol evidence held not admissible to establish that fact so as to make the contract valid under the statute of frauds.—Willebrandt v. Sisters of Mercy, Mich., 152 N. W. 85.

53.——Original Promise.—Defendant's oral direction to a merchant to let his tenant have what he wanted, and his promise to pay "dollar for dollar," was an "original promise," not within the statute of frauds.—Lovell v. Haye, Wash., 147 Pac. 632.

54.——Tenancy at Will.—A parol agreement for a lease of real estate for more than one year is void, and a tenancy at will is created by the lessee entering into possession.—Crane v. Franklin, Ariz., 147 Pac. 718.

55. **Garnishment**—Answer. — A garnishee should set forth specifically his relations to defendant's moneys in his hands.—Atchison, T. & S. F. Ry. Co. v. Bowman, Kan., 147 Pac. 813.

56. **Gifts**—Loan.—The act of decedent's divorced wife in returning to him, pursuant to his request, money which he had paid her to fulfill a moral obligation, held a voluntary gift, and not a loan recoverable against his estate.—In re Myers' Estate, Pa., 93 Atl. 818.

57. **Insurance**—Violation of Instructions.—An insurance agent who issues a policy in violation of his instructions is liable to the company for insurance paid and expenses incurred on account of a loss under the policy.—Insurance Co. of North America v. Baer, Kan., 147 Pac. 840.

58. **Joint Adventures**—Duration.—The duration of a joint adventure, if no date is fixed therefor, continues until the purpose is accomplished, and neither party can end it at will; but where it requires more time and money than was estimated, either party may withdraw without liability to the other.—Goss v. Lanin, Iowa, 152 N. W. 43.

59. **Landlord and Tenant**—Covenant.—Covenant of lessee of a farm to destroy all weeds held merely to obligate him to make all reasonable efforts to do so, according to the standards of good husbandry in the vicinity.—Kossel v. Potratz, Wis., 152 N. W. 189.

60.——Repairs.—A tenant under a lease, containing no provision for repairs by the landlord, may not recover for damages to his goods through a defect in the roof.—Spicer v. Machette, Colo., 147 Pac. 657.

61. **Libel and Slander**—Privilege.—Conversations between husband and wife may be privileged though incidentally overheard by third persons.—Conrad v. Roberts, Kan., 147 Pac. 795.

62. **Lost Instruments**—Burden of Proof.—One who relies upon a lost deed to sustain his title must establish the original existence of the deed, its loss, and the material parts thereof by

convincing evidence.—Margett v. Wilson, Wash., 147 Pac. 628.

63. **Master and Servant**—Employe of City.—St. 1913, § 925—171a, relating to city parks, applies to a city which has not adopted the general city charter law, notwithstanding the provision of St. 1913, § 925—2, and such city is liable under the Workmen's Compensation Act for the death of a park caretaker.—City of Superior v. Industrial Commission of Wisconsin, Wis., 152 N. W. 151.

64.——Employers' Liability Act.—Contract exempting railroad company from liability for injuries to express messenger, who was its employe, held void under Employers' Liability Act, § 5.—Taylor v. Wells-Fargo & Co., U. S. C. C. A., 220 Fed. 796.

65.——Hours of Service Act.—Breaking in two of train, due to defective equipment or improper handling, held not an excuse for a violation of Hours of Service Act.—United States v. Southern Pac. Co., U. S. C. C. A., 220 Fed. 745.

66.——Imminent Danger.—That an employe would not have been killed had he not attempted to escape from an elevator would not preclude recovery for his death where he acted in good faith in an endeavor to escape from an apparent danger.—McFadden v. City of Philadelphia, Pa., 93 Atl. 827.

67.——Inspection.—An employe engaged in cutting a hole through a brick wall under the directions of defendant's foreman, held under no duty to inspect to ascertain the dangers incident to his work.—Wheeler v. Tyler, Minn., 152 N. W. 137.

68. **Mines and Minerals**—Implied Condition.—It is an implied condition of every oil lease that when the existence of oil in paying quantities becomes apparent the lessee shall put down as many wells as may be reasonably necessary to the advantage of both lessor and lessee.—Highfield Co. v. Kirk, Pa., 93 Atl. 815.

69. **Mortgages**—Presumption.—A conveyance absolute in form is presumed to be an absolute conveyance, and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing.—Bryan v. Boyd, S. C., 84 S. E. 992.

70.——Tender.—Tender of interest due on deed of trust, not taken because interest coupon could not be found, held to place on the holder the burden of subsequently demanding payment, and where no proper demand was made a foreclosure was properly vacated.—Higbee v. Chadwick, U. S. C. C. A., 220 Fed. 873.

71.——Voluntary Payment. — Where the grantees, in a deed intended as a mortgage, were forced, in order to protect their interests, to pay an incumbrance and taxes and also certain interest, the payment of which they had not assumed, they were entitled to be reimbursed therefor, with interest, by the grantors. Gibbs v. Wallace, Colo., 147 Pac. 686.

72. **Negligence**—Proximate Cause. — Where defendant's negligence was the proximate cause of plaintiff's injury, any negligence of plaintiff was merely a condition.—Johnson v. Johnson, Wash., 147 Pac. 649.

73. **Parent and Child**—Agency.—A son not employed in, or connected with his father's mercantile business cannot bind his father by purchasing from a third person a motorcycle shipped to his father, who had no knowledge of the transaction.—Starcher v. Thompson, S. D., 152 N. W. 99.

74. **Partnership**—Evidence.—A partner who fraudulently misrepresented the price of land purchased by him for the firm cannot testify in his own behalf that he had no intent to defraud his partner.—Chilton v. Groome, N. C., 84 S. E. 1038.

75. **Principal and Agent**—General Agent.—A "general agent" is one who is authorized to act for his principal in all matters concerning the particular business, and as to third persons his apparent authority may not be restricted by secret instructions.—Powell & Powell v. King Lumber Co., N. C., 84 S. E. 1032.

76.——Ratification.—Principal held to have ratified agent's lease of store for local agency in its name by continuing in possession without disaffirming after learning thereof.—Hosteter v. Wear-U-Well Shoe Co., Iowa, 152 N. W. 1.

77.——Strictissum Juris.—The measure of a surety's liability is strictly limited by that of his principal, since a surety is bound only to answer for the principal's default.—Alexander v. Bosworth, Cal., 147 Pac. 607.

78. **Prostitution** — Defined. — Prostitution means the common and indiscriminate engaging by a woman in sexual intercourse for money, or its equivalent, with all persons who may offer.—Ferguson v. Superior Court in and for Kern County, Cal., 147 Pac. 603.

79.——White Slave Act.—Accused's expectation of resuming immoral relation with girl on her return home held not to make him guilty under White Slave Traffic Act, in the absence of any persuasion by him.—Welsch v. United States, U. S. C. C. A., 220 Fed. 764.

80.——White Slave Traffic.—The immorality denounced by White Slave Traffic Act June 25, 1910, is not limited to commercialized vice, and the act applies to transportation for the purpose of making the girl the concubine or mistress of the person transporting her.—Diggs v. United States, U. S. C. C. A., 220 Fed. 545.

81. **Receivers** — After Acquired Stock.—Where mortgaged chattels, with the consent of the mortgagee and other creditors, was transferred to a receiver, and by him sold without separation of after acquired stock not covered by the mortgage, the doctrine of confusion of mortgaged property held not applicable, so that a chattel mortgage could not be denied priority.—Hollenbeck v. Louden, S. D., 152 N. W. 116.

82. **Reformation of Instruments**—Burden of Proof.—A party seeking reformation of a deed for mistake must produce evidence sufficient to rebut the presumption created by the existence of the instrument.—Gibbs v. Wallace, Colo., 147 Pac. 686.

83. **Release**—Conspiracy. — Agreement between directors of corporation owning all of its stock, and release of two of them from liability for alleged fraudulent conspiracy with defendant, held to have released defendant from liability.—Tanana Trading Co. v. North American Trading & Transportation Co., U. S. C. C. A., 220 Fed. 783.

XUM

84. **Sales**—Estoppel.—Buyers who, after declaring rescission and offering to return property, sold it, and, when sued for the purchase price, pleaded no present tender, held to have abandoned their tender by failure to keep it good.—Pleak v. Marks & Shields, Iowa, 152 N. W. 63.

85.——False Representation.—A representation that furniture sold was unincumbered was false and fraudulent, though the seller had been advised by his attorney that the chattel mortgage against it was not valid.—Gillette v. Anderson, Wash., 147 Pac. 634.

86.——Implied Warranty.—Automatic nut-tapping machines held sold on an implied warranty that they would suitably work the kind of stock regularly used by plaintiff.—Kansas City Bolt & Nut Co. v. Rodd, U. S. C. C. A., 220 Fed. 750.

87. **Taxation**—Quit-Claim Deed.—Where deed of trust required the owner to pay all taxes, the holder of invalid tax deeds did not by accepting a quit-claim deed from the owner lose his right to demand that on foreclosure the property should be redeemed from unpaid taxes.—Gibson v. Woods, Colo., 147 Pac. 349.

88.——Statutory Construction. — The word "corporation," as used in a constitutional provision relating to the assessment and taxation of the property of corporations, held to include an express company which was a joint-stock association.—Fargo v. Powers, U. S. D. C., 220 Fed. 697.

89. **Telegraphs and Telephones**—Evidence.—In an action against a telegraph company for failure to deliver a message, exclusion of plaintiff's reply to a question seeking to elicit the contents of the letter by which he notified defendant, in accordance with their contract, of his demand upon it, held improper.—Bennett v. Western Union Telegraph Co., N. C., 84 S. E. 798.

90.——Free Delivery Limits.—The sender of a telegram being notified by the company that the sendee is outside of the free delivery limits, and refusing to guarantee the extra charge, the company is not liable for failure to deliver.—Smith v. Western Union Telegraph Co., N. C., 84 S. E. 796.

91.——Negligence.—A telegraph company not negligent in transmitting a telegram addressed to plaintiff, but which, with notice of probable damage, was negligent in not delivering it to him, although, as received, the middle initial was different, was liable in damages.—Western Union Telegraph Co. v. Gorman & Wilson, Tex., 174 S. W. 925.

92. **Trade-Marks and Trade-Names**—Descriptive Words.—The use of the term "copper-clad" in connection with steel wire coated with copper held descriptive, and to give complainant no exclusive right which would support a suit for unfair competition.—Duplex Metals Co. v. Standard Underground Cable Co., U. S. D. C., 220 Fed. 989.

93.——Exclusive Appropriation.—Where a trade-mark consists of a hyphenated word, one part of which is descriptive, and not subject to exclusive appropriation, while the other is purely abitrary, the appropriation by another of the descriptive part only is not an infringement.—S. R. Feil Co. v. John E. Robbins Co., U. S. C. C. A., 220 Fed. 650.

94. **Trusts**—Breach.—Moneys transferred by an agent cannot be recovered by a principal, by whom they were held in trust, if they were received by the transferee in due course of business and for a valid consideration without notice of the breach of trust.—Hanford v. Duchastel, N. J., 93 Atl. 586.

95.——Consideration.—The presumption arising under Civ. Code, § 2235, relative to transactions between a trustee and his beneficiary, by which the trustee obtains an advantage, is that they are without "sufficient consideration," and not that there is a total want of consideration.—Metropolis Trust & Savings Bank v. Monnier, Cal., 147 Pac. 265.

96. **Vendor and Purchaser**—Inability to Convey Title.—A vendor unable to convey good title must, on demand, convey such interest as he has and receive the purchase money, less an abatement thereof equal to the value of the interest not conveyed.—Brisbane v. Sullivan, N. J., 93 Atl. 705.

97.——Lien.—Release of vendors' lien reserved in deed, held not to estop vendor from claiming under a subsequent mortgage taken in lieu of the lien, as against one claiming mechanic's lien under contract with purchaser's grantee.—Moore v. Rockport Hotel Co., Tex., 174 S. W. 837.

98.——Part Payment.—Where one, obtaining a contract to purchase real estate, and making a cash payment to an agent of the owner, procured cancellation of the contract and return of a part of the payment, he could not recover the balance.—Ede v. Ward, S. D., 152 N. W. 101.

99.——Quit-Claim.—Where a grantee in a quit-claim deed conveyed to a third person by warranty deed, the third person was not an innocent purchaser, the record showed prior conveyance by grantor in quit-claim deed.—Cook v. Smith, Tex., 174 S. W. 1094.

100. **Warehousemen**—Negligence.—One with whom, for hire, apples are stored for purpose of resale, having, on direction of the bailor to deliver to a purchaser, undertaken to load them for shipment, is liable to the purchaser for negligence in loading them, causing injury thereto.—Pure Ice & Cold Storage Co. v. Weinberg, Tex., 174 S. W. 911.

101. **Waters and Water Courses**—Damages.—Where land damaged by obstruction of water is part of a larger tract constituting a single farm, the damages may be assessed on the basis of the decreased rental value of the whole farm.—Skinner v. Great Northern Ry. Co., Minn., 151 N. W. 968.

102.——Prescription.—A prescriptive right to water of a stream cannot be obtained against a riparian owner, unless the user is adverse and under claim of right.—Turner v. East Side Canal & Irrigation Co., Cal., 147 Pac. 579.

103.——Receivership.—Citizen and user of water held entitled to sue to compel water company to perform its public duties, and to bring such action in a court of equity administering the company's affairs by a receiver.—Walton v. Proutt, Ark., 174 S. W. 1152.

104.——Riparian Owner.—A riparian proprietor's title to water begins only when it reaches his land, and lasts only so long as it flows past his land.—Miller & Lux v. Enterprise Canal & Land Co., Cal., 147 Pac. 567.

105.——Surface Water.—Where a drain was laid through plaintiffs' lands with their consent, and surface water carried through it from defendant's lands, as well as from part of plaintiffs,' with plaintiffs' assent, for more than ten years, defendant acquired a prescriptive right of drainage.—Pascal v. Hynes, Iowa, 152 N. W. 26.

106.——Water Rights.—The purpose of statutory proceeding to determine priority of water rights is to settle only the amount of water entitled to be diverted by, and the relative priorities of, ditches on a natural stream.—Snyder v. Colorado Gold Dredging Co., Colo., 147 Pac. 330.

107. **Wills**—Moities.—Where a will directs that a gift be divided "between" one individual named and a class, the division is to be made by moities, unless a contrary intention can be derived from the will.—In re Ghriskey's Estate, Pa., 93 Atl. 824.

108.——Perpetuities.—Where a will leaves in doubt whether a devise or bequest is so remote as to violate the rule against perpetuities, the doubt will be resolved to vest the title at the earliest possible moment so as to uphold the will.—Anderson v. Menefee, Tex., 174 S. W. 904.

109.——Testamentary Capacity.—The time when a will was made is the time to be considered in determining testamentary capacity.—Wisner v. Chandler, Kan., 147 Pac. 849.